APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

GARY GREENBERG, husband, *Plaintiff-Appellee*,

v.

PAUL REVERE LIFE INSURANCE COMPANY, a foreign corporation; UNUMPROVIDENT CORP., a foreign corporation fka Provident Companies, Inc., *Defendants-Appellants*.

No. 02-16501

Argued and Submitted Oct. 9, 2003.
Decided Jan. 12, 2004.

As Amended on Denial of Rehearing and Rehearing En Banc March 4, 2004.

Before PREGERSON, BEAM,* and PAEZ, Circuit Judges.

MEMORANDUM**

Defendants, Paul Revere Life Insurance Company and its corporate affiliates (collectively, "Paul Revere"), appeal from the district court's judgment following a jury verdict in favor of Plaintiff Gary Greenberg's ("Greenberg") claim of bad faith termination of disability benefits. Paul Revere argues that the district court committed various evidentiary errors, misinterpreted the type of damages available under Arizona law, and allowed an impermissible award of punitive dam-

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* The Honorable C. Arlen Beam, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

ages. We have jurisdiction under 28 U.S.C. § 1291 and affirm the judgment.

I. The district court's evidentiary rulings.

Paul Revere contends that the district court committed reversible error when it (a) admitted the testimony of Greenberg's insurance industry expert, (b) excluded Paul Revere's expert testimony about Greenberg's demeanor during a deposition, and (c) excluded Paul Revere's evidence of Greenberg's website postings. We review evidentiary rulings for an abuse of discretion. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 886 (9th Cir.2002).

First, the district court did not abuse its discretion in admitting the testimony of Greenberg's industry expert, Donald Kelley. Contrary to Paul Revere's contention, the district court was not required to assess Kelley's testimony against the factors articulated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) — peer review, publication, error rates, etc. — where it was the "kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir.2000). Even assuming that the district court erred in allowing Kelley to testify, we cannot reverse absent some showing of prejudice. See *Janes*, 279 F.3d at 886. Here, Paul Revere was not prejudiced because much of Kelley's testimony about the industry standards for the proper handling of disability claims was corroborated by one of Paul Revere's lead claim examiners on the witness stand. Thus, the decision to admit Kelley's testimony ultimately was not prejudicial.

Second, the district court properly barred Dr. Steven Pitt from testifying about his impressions of Greenberg's demeanor during a deposition because Paul Revere failed to

disclose this additional testimony until the eve of trial.[1] Moreover, Paul Revere is unpersuasive in invoking the "treating physician" exemption because Dr. Pitt's observations at the deposition were clearly outside of a "treatment" context.

Third, the district court properly excluded Paul Revere's evidence of Greenberg's website postings as irrelevant. In any event, Paul Revere waived its objection when it failed to later request an evidentiary hearing after earlier being invited to do so by the district court.

None of these evidentiary rulings constitute reversible error.

II. The availability of "future benefits" under Arizona tort law.

Paul Revere challenges the district court's decision to allow future benefits as part of an award for a bad faith termination of benefits under Arizona law. We review *de novo* a district court's interpretation of state law. See *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir.2002) (en banc).

Although the Arizona Supreme Court has not addressed this issue directly, the district court correctly noted that Arizona law contains a general presumption in favor of future damages. See *Wendelken v. Superior Court*, 137 Ariz. 455, 671 P.2d 896, 899 (1983) ("Arizona allows unlimited recovery for actual damages, expenses for past and prospective medical care, past and prospective pain and suffering, lost earnings, and diminished earning capacity."). Other states

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[1] Paul Revere's attempt to categorize Dr. Pitt as a layperson runs afoul of a 2000 amendment to Federal Rule of Evidence 701, which "ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson." Fed.R.Evid. 701 advisory committee's notes.

have found that an award of future damages is consistent with the general tort requirement of "direct and proximate" causation where there is evidence that (1) the insured will continue to be "entitled" to disability benefits,[2] and (2) the insurer will continue to deny those benefits.[3] Thus, were the Arizona Supreme Court to address this issue, it would likely hold that future policy benefits may be awarded as compensatory damages.

Here, Greenberg presented considerable evidence that his condition was likely permanent and would qualify him for disability benefits into the future. The record also suggests that the jury believed that Paul Revere had irrevocably strained its relationship with Greenberg and had basically repudiated the contract.[4] In light of all the evidence and the availability of future policy benefits under Arizona law, the district court did not err in allowing the jury to include such benefits as part of its award of compensatory damages.

III. Availability of punitive damages.

We review Paul Revere's challenge to the sufficiency of evidence supporting the punitive damages award under the "substantial evidence" standard. See *Fair Housing of Marin v. Combs*, 285 F.3d 899, 907 (9th Cir.2002). Here, Green-

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[2] See, *e.g.*, *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 169 Cal.Rptr. 691, 620 P.2d 141, 149 n. 7 (1979) (en banc) (allowing future policy benefits as part of compensatory damages if the jury could reasonably conclude that the policy holder would have been entitled to receive future benefits had the contract not been terminated).

[3] See *e.g.*, *DeChant v. Monarch Life Ins. Co.*, 204 Wis.2d 137, 554 N.W.2d 225, 229 (Ct.App.1996) (holding that future benefits are available upon a finding of bad faith because "repudiation is a legal conclusion which the trial court reaches after the fact finder makes its determinations about whether there was a breach and whether the breach was in bad faith").

[4] The jury's decision to award future damages to Greenberg rather than allow Paul Revere to reinstate the policy suggests that the jury believed that Paul Revere would find another way to deny benefits to Greenberg.

berg proffered ample evidence that Paul Revere acted with the "evil mind" necessary to support a punitive award under Arizona law. See *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 679-80 (1986).

IV. Excessiveness of punitive damages.

We review de novo Paul Revere's claim that the punitive damages award of $2.4 million was unconstitutionally excessive. *In re Exxon Valdez*, 270 F.3d 1215, 1240 (9th Cir.2001). Applying the three factors identified in *BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 1598-99, 134 L.Ed.2d 809 (1996) — the degree of reprehensibility, the ratio between compensatory and punitive damages, and the availability of civil penalties for comparable misconduct — we find that the punitive award was not excessive.

The evidence of Paul Revere's repeated conduct, which included acts of deceit, towards a financially vulnerable plaintiff was sufficient to allow the jury to find such behavior reprehensible. See *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1521, 155 L.Ed.2d 585 (2003); *BMW*, 116 S.Ct. at 1599, 116 S.Ct. 1589. The 4.4:1 ratio between the compensatory and punitive awards in this case is similar to the 4:1 ratio in *BMW* and well within the "single digit ratio" that marks the outer limits of permissible disparities. *State Farm*, 123 S.Ct. at 1524. Considering that possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which in this case could be worth hundreds of millions of dollars to Paul Revere, we conclude that the $2.4 million punitive award was not unconstitutionally excessive.[5]

AFFIRMED.

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[5] The district court also found that the punitive award in this case was within the range of other jury verdicts in similar bad faith cases in Arizona.

APPENDIX B

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

GARY GREENBERG, husband, *Plaintiff-Appellee*,

v.

PAUL REVERE LIFE INSURANCE COMPANY,
a foreign corporation; UNUMPROVIDENT CORP., a foreign corporation fka Provident Companies, Inc.,
Defendants-Appellants.

No. 02-16501

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* The Honorable C. Arlen Beam, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

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I. The district court's evidentiary rulings.

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Second, the district court properly barred Dr. Steven Pitt from testifying about his impressions of Greenberg's demeanor during a deposition because Paul Revere failed to disclose this additional testimony until the eve of trial.[2]

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[1] When the district court suggested allowing Kelly to testify about industry standards for claims handling but barring him from testifying about legal matters, Paul Revere responded, "Then we'll have no problem with the Court's order. *None of the objectional [sic] information will be elicited.*

[2] Paul Revere's attempt to categorize Dr. Pitt as a layperson runs afoul of a 2000 amendment to Federal Rule of Evidence 701, which "ensures that a party will not evade the expert witness disclosure requirements set

Moreover, Paul Revere is unpersuasive in invoking the "treating physician" exemption because Dr. Pitt's observations at the deposition were clearly outside of a "treatment" context.

Third, the district court properly excluded Paul Revere's evidence of Greenberg's website postings as irrelevant. In any event, Paul Revere waived its objection when it failed to later request an evidentiary hearing after earlier being invited to do so by the district court.

None of these evidentiary rulings constitute reversible error.

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Paul Revere challenges the district court's decision to allow future benefits as part of an award for a bad faith termination of benefits under Arizona law. We review de novo a district court's interpretation of state law. See *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir.2002) (en banc).

Although the Arizona Supreme Court has not addressed this issue directly, the district court correctly noted that Arizona law contains a general presumption in favor of future damages. See *Wendelken v. Superior Court*, 137 Ariz. 455, 671 P.2d 896, 899 (1983) ("Arizona allows unlimited recovery for actual damages, expenses for past and prospective medical care, past and prospective pain and suffering, lost earnings, and diminished earning capacity."). Other states have found that an award of future damages is consistent with the general tort requirement of "direct and proximate" causation where there is evidence that (1) the insured will

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forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson." Fed.R.Evid. 701 advisory committee's notes.

continue to be "entitled" to disability benefits,[3] and (2) the insurer will continue to deny those benefits.[4] Thus, were the Arizona Supreme Court to address this issue, it would likely hold that future policy benefits may be awarded as compensatory damages.

Here, Greenberg presented considerable evidence that his condition was likely permanent and would qualify him for disability benefits into the future. The record also suggests that the jury believed that Paul Revere had irrevocably strained its relationship with Greenberg and had basically repudiated the contract.[5] In light of all the evidence and the availability of future policy benefits under Arizona law, the district court did not err in allowing the jury to include such benefits as part of its award of compensatory damages.

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We review Paul Revere's challenge to the sufficiency of evidence supporting the punitive damages award under the "substantial evidence" standard. See *Fair Housing of Marin v. Combs*, 285 F.3d 899, 907 (9th Cir.2002). Here, Greenberg proffered ample evidence that Paul Revere acted with the "evil mind" necessary to support a punitive award under

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[3] See, *e.g.*, *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 169 Cal.Rptr. 691, 620 P.2d 141, 149 n. 7 (1979) (en banc) (allowing future policy benefits as part of compensatory damages if the jury could reasonably conclude that the policy holder would have been entitled to receive future benefits had the contract not been terminated).

[4] See *e.g.*, *DeChant v. Monarch Life Ins. Co.*, 204 Wis.2d 137, 554 N.W.2d 225, 229 (Ct.App.1996) (holding that future benefits are available upon a finding of bad faith because "repudiation is a legal conclusion which the trial court reaches after the fact finder makes its determinations about whether there was a breach and whether the breach was in bad faith").

[5] The jury's decision to award future damages to Greenberg rather than allow Paul Revere to reinstate the policy suggests that the jury believed that Paul Revere would find another way to deny benefits to Greenberg.

Arizona law. See *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 679-80 (1986).

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We review de novo Paul Revere's claim that the punitive damages award of $2.4 million was unconstitutionally excessive. *In re Exxon Valdez*, 270 F.3d 1215, 1240 (9th Cir.2001). Applying the three factors identified in *BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 1598-99, 134 L.Ed.2d 809 (1996) — the degree of reprehensibility, the ratio between compensatory and punitive damages, and the availability of civil penalties for comparable misconduct — we find that the punitive award was not excessive.

The evidence of Paul Revere's repeated conduct, which included acts of deceit, towards a financially vulnerable plaintiff was sufficient to allow the jury to find such behavior reprehensible. See *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1521, 155 L.Ed.2d 585 (2003); *BMW*, 116 S.Ct. at 1599, 116 S.Ct. 1589. The 4.4:1 ratio between the compensatory and punitive awards in this case is similar to the 4:1 ratio in BMW and well within the "single digit ratio" that marks the outer limits of permissible disparities. *State Farm*, 123 S.Ct. at 1524. Considering that possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which in this case could be worth hundreds of millions of dollars to Paul Revere, we conclude that the $2.4 million punitive award was not unconstitutionally excessive.[6]

AFFIRMED.

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[6] The district court also found that the punitive award in this case was within the range of other jury verdicts in similar bad faith cases in Arizona.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GARY GREENBERG, *Plaintiff*,

vs.

THE PAUL REVERE LIFE INSURANCE CO., ET AL., *Defendants*.

No. CV99-0154-PHX-SRB

Filed June 26, 2002

ORDER

Defendants filed a Motion for Judgment as a Matter of Law, for a New Trial and/or Remittitur and, in the Alternative, Motion to Amend Judgment on January 24, 2002. The Motion For Judgment as a Matter of Law asserts that the evidence was insufficient to support the jury's verdict on bad faith, that the Court erred in allowing future benefits to be awarded by the jury, that the Court erred in allowing the case to proceed against UNUMProvident, and that the evidence was insufficient to support the punitive damage award.

Although Defendants had asserted that the evidence was insufficient to support the jury's verdict in Plaintiffs favor on bad faith, the argument appears to have been abandoned in the Memorandum of Points and Authorities filed March 15, 2002. No argument was presented nor were authorities cited on this issue. In the memorandum of point and authorities, Defendants confine their arguments to their assertion that it was legal error to allow for the award of future benefits, to permit the case to proceed against UNUMProvident and to submit the punitive damage claim to the jury.

Plaintiff elected to proceed to trial only on the tort of bad faith and dismissed his claim for breach of contract. Recoverable damages for breach of contract would include only

damages to the time of trial and future benefits would not be awardable. While there is no Arizona case directly on point in the context of a bad faith claim for termination of disability benefits, future lost wages, future medical expenses, future pain and suffering, if proved, are part of the general damages awarded in tort. See Recommended Arizona jury Instruction (Civil) Personal Injury Damages I. The Court sees no reason why the Arizona Supreme Court would not extend this general rule of damages to the recovery of future disability benefits in a case such as this where the evidence supports the jury's finding that Plaintiff's disability from his occupation of stockbroker was a permanent one and that he would never be able to return to that occupation. This Court is persuaded that the Arizona Supreme Court would adopt the rational adopted by the California Supreme Court in *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, (1979) wherein the court held that future policy benefits were recoverable as part of the jury's compensatory damage award if the jury could reasonably conclude that the policy holder would have been entitled to receive future benefits had the contract not been terminated by the insurer.

Defendants have presented nothing new to the Court on the issue of UNUMProvident's liability for bad faith. Their Motion for Judgment as a Matter of Law makes the same arguments previously made and rejected by the Court when it permitted the jury to consider the liability of UNUMProvident, even though the contract was between Paul Revere and Plaintiff. The corporate changes subsequent to the issuance of the policy resulted in UNUMProvident employees assuming the claims handling function for Paul Revere. It was undisputed that UNUMProvident employees made the decision to initiate the investigation of the claim, retained the medical experts to evaluate the disability, determined what information to provide to the medical experts, and ultimately made the decision to terminate policy benefits. The evidence demonstrated that Paul Revere had no claims handling function

after the acquisition of Paul Revere and that all decisions made in good faith or bad were made by UNUMProvident. Even Plaintiff's termination of benefits letter was sent on UNUMProvident letterhead. Defendants have presented nothing that would alter this Court's view that UNUMProvident could be found liable for bad faith and the jury properly considered the bad faith claim against it.

On the punitive damage award, Defendants make several arguments, including that the punitive award was not supported by substantial evidence. The Court disagrees. Plaintiff presented evidence which, if believed, demonstrated that the UNUMProvident employees acted to serve their own interests and conscientiously disregarded a substantial risk of significant harm to the Plaintiff. The jury may have concluded that sending the Goldfarb statement to the independent medical examiner was sent to prejudice the opinion and to create a basis upon which a diagnosis of malingering would be made. The evidence showed that not all of the information UNUMProvident had about Goldfarb was communicated to the medical examiner which the jury may have found was done with the intent to cause Plaintiff injury. The Court finds that the punitive award was supported by substantial evidence.

Defendants raised 22 grounds for new trial in the motion filed January 24, 2002. The actual Memorandum of Points and Authorities asserts only several. In the March 15, 2002 Memorandum of Points and Authorities Defendant seek a new trial on the grounds that the great weight of the evidence does not support the jury's finding of bad faith, the great weight of the evidence does not support the jury's finding of punitive damages, the Court erred in permitting Donald Kelly to testify as an expert, the Court erred in refusing to allow the jury to award anything but past benefits, the Court erred in refusing to allow Dr. Pitt to testify about his observations of Mr. Greenberg's on-going disability at the time of Dr. Pitt's deposition taken by Mr. Greenberg and the punitive award is both excessive and violative of due process.

A new trial may be granted if the Court determines that the verdict is against the great weight of the evidence or finds that the jury has reached a seriously erroneous result. *Venegas v. Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987); *Digidyne Corp. v. Data General Co.*, 734 F.2d 1336, 1347 (9th Cir. 1984). A verdict supported by substantial evidence may still be set aside and a new trial granted when the Court determines that it is contrary to the clear weight of the evidence and necessary to prevent a miscarriage of justice. *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999). The Court sits as the 13th juror, weighs the evidence and assesses the credibility of witnesses. The Court need not view the evidence from the perspective most favorable to the prevailing party. *Landis Construction Company, Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). In *Landis Construction*, the Ninth Circuit cited with approval the test suggested by Wright and Miller,

It may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions of the type now being considered. Necessarily all formulations are couched in broad and general terms that furnish no unerring litmus for a particular case. On the one hand, the trial judge does not sit to approve miscarriages of justice. The judge's power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with a definite and firm conviction that a mistake has been committed, it is to be expected that he will

grant a new trial. 11 Wright, Miller and Kane, Federal Practice and Procedure: Civil 2nd Section 2806 at p. 74-75 (1995).

This Court having considered and weighed the evidence and having given full respect to the jury's finding is not left with a definite and firm conviction that a mistake has been made or that a miscarriage of justice has resulted. This case did not involve complex issues difficult for the jury to understand. Instead, it involved much conflicting evidence and many credibility determinations. Resolution of such conflicts and credibility issues are best suited for jury determination. The jury in this case resolved the credibility issues and the numerous conflicts in the testimony in favor of the Plaintiff's claim that his benefits were terminated in bad faith rather than in favor of the Defendant's claim that he was no longer disabled but was deliberately malingering. This Court cannot say that the verdict was against the great weight of the evidence and is not of the view that the jury's finding is a miscarriage of justice.

On this Motion for New Trial Defendants have presented nothing new to cause this Court to reconsider its ruling in limine allowing Don Kelly to testify as an expert and a new trial will not be granted on this basis.

Defendants argue that the gravamen of Plaintiff's action was claims handling not the decision to terminate benefits and therefore the Court's direction to the jury that if it found in favor of Plaintiff it must award the policy benefits from the date of termination to present and all premiums paid from November 19, 1998 to present was error as a matter of law. Defendants suggest that the jury could have found Defendants liable in tort and limited damages only to emotional distress. In response, Plaintiff points out that the instruction given to the jury in this case only permitted the jury to find bad faith if Defendants intentionally denied or terminated benefits without a reasonable basis. No general bad faith

claim for claims handling was presented for the jury's consideration.

This case was about benefit termination. Defendants' counsel's conceded: "the issue is simply whether or not we properly terminated them (the benefits)." Counsel also responded "yes" to the Court's question "So you're going to concede, and I can instruct the jury at the time of the damages, that the defense concedes that in the event they determine that the benefits were terminated in bad faith that benefits are due at least through the date of their verdict?" (Trial Transcript Vol. 5 p. 45-46). Defendants' Motion for New Trial on this ground is clearly meritless.

The final claimed legal error is the Court's refusing to allow Dr. Pitt to testify concerning his observations of Plaintiff while Plaintiff deposed Dr. Pitt. Defendants argue that because Plaintiff's present treating physician was allowed to testify concerning his present and future mental disability that Dr. Pitt should have been permitted to opine about his observation that Mr. Greenberg did not seem to be suffering from a mental disability at the time Dr. Pitt's deposition was taken. The Court precluded this testimony because of lack of disclosure. Defendants assert that no disclosure was required and Dr. Pitt should have been permitted to testify about his observations of the Plaintiff while Dr. Pitt was being deposed.

Plaintiff responds by noting the requirement for disclosure and the sanction of preclusion if disclosure is not made. The Court ruled "Since Dr. Pitt has never been disclosed as someone that would say anything about Mr. Greenberg's disability or lack of a disability after the date that he authored his report, he will not be allowed to say so at trial. You obviously could have after the deposition concluded supplemented disclosure and said, oh and now we are going to offer Dr. Pitt to say not only did he think he was fine way back when, but I can tell now based on the fact that he conducted

the deposition that he's just as fine now." November 7, 2001 transcript page 19. This Court continues in its opinion that Federal Rule 26 required disclosure if Dr. Pitt was going to opine about Plaintiff's disability on any date subsequent to the date he authored his report and Federal Rule 37 authorizes preclusion of this undisclosed evidence at trial.

The final basis upon which a new trial is sought concerns the claim that the amount of punitive damages was excessive and violative of due process. The standard to evaluate punitive damages is different when the Court is determining whether punitive damages are excessive under state law or violate the federal due process clause. On the state law claim of excessiveness the Court applies the following criteria: the proportionality of the award to the wrongdoer's financial position to ensure that the goals of punishment and deterrence are served without financially devastating the Defendants; the reprehensibility of the Defendants' conduct including its duration, and Defendants' awareness of the risk of harm and any concealment; and the profitability to the Defendant of the wrongful conduct. *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073, 1080-1085 (Ariz. 1987), *Hyatt Regency Phoenix Hotel Company v. Winston and Strawn*, 907 P.2d 506, 520 (App. 1995).

The jury awarded punitive damages of $2.4 million. The evidence showed that UNUMProvident's annual net income after taxes was $564.2 million and that UNUMProvident had a net worth of $5.575 billion. $2.4 million represented approximately one day of after-tax income for UNUMProvident. The amount awarded was not financially devastating to the Defendant and the Court cannot say that it was disproportionate to awards made in Arizona in bad faith cases. Defendants' conduct when viewed in a light most favorable to upholding the award was reprehensible. Defendants knew of the risk of harm to the Plaintiff. A disability policy by its very nature is income replacement and the loss of disability benefits could clearly have a devastating financial impact to

the Plaintiff and his family. The jury had evidence that Defendants provided selective information to its medical examiner withholding favorable information as it related to the Goldfarb statement, and the Defendants ignored their own employee's recommendations with regard to further investigation of the truth of the Goldfarb statement. After termination, while suggesting that Plaintiff and his physician could present additional evidence of disability, Defendants refused to provide the Goldfarb statement so that it could be addressed. Finally, there was profitability to Defendants' wrongful conduct by terminating benefits. Defendants saved hundred of thousands of dollars in benefits past due and due in the future to Plaintiff. The award is not excessive under Arizona law.

This Court is required to review punitive damage awards for compliance with constitutional due process. The Supreme Court has set out three guideposts the Court must evaluate against the punitive award. They are 1) the degree of reprehensibility of the Defendants' misconduct; 2) the disparity between the harm (or potential harm) suffered by the Plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678 (2001); *BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996). Applying these three guideposts the Court cannot say that this award of $2.4 million violates due process. As detailed previously, Defendants' conduct was reprehensibile. The harm to Plaintiff was not purely economic in nature and deceit could have been found by the jury based on the information selectively disclosed to and withheld from Dr. Pitt.

The ratio of approximately 4:1 is clearly within the constitutional range. At Defendants' request, the jury was instructed that any punitive award must have a rational relationship between the amount of harm caused by the De-

fendants and the punitive award. There is no evidence that the jury was influenced by passion or prejudice but awarded a reasonable amount for punitive damages in relation to the compensatory award.

The third guidepost asks the Court to compare the punitive award to the possible civil or criminal penalty that could be imposed. While there is no direct comparable penalty and Defendants look to the $5,000 maximum fine that could be imposed, Plaintiff points out that suspension or revocations of an insurer's license is a possible penalty for improper claims handling. A.R.S. § 20-220(A)(4) permits revocation of an insurer's certificate of authority to do business in Arizona if it "usually compels claimants under its policies to accept less than the amount due them or to bring suit against them to secure full payment thereof" in addition to the $5,000.00 civil penalty for the violation of A.R.S. § 20-220 (B)(1). The verdict does not violate due process.

Defendants' final motion is a Motion to Amend the Judgment to reflect that the award of future damages satisfies Defendants' obligation to pay disability benefits to Plaintiff under the policy. Plaintiff bas no objection. This motion will be granted.

IT IS ORDERED denying Defendant's Motion for Judgment as a Matter of Law. (Doc. 246-1).

IT IS FURTHER ORDERED denying Defendants' Motion for New Trial and/or Remittitur. (Doc. 246-2).

IT IS FURTHER ORDERED granting Defendants' Motion to Amend Judgment. The award of future damages by the jury satisfies Defendants' obligations to pay disability benefits to Plaintiff under the policy. (Doc. 246.3).

DATED this 25th day of June, 2002.

/s/ SUSAN R. BOLTON

Susan R. Bolton
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY GREENBERG, husband,
Plaintiff-Appellee

v.

PAUL REVERE LIFE INSURANCE COMPANY, a foreign corporation; UNUMPROVIDENT CORP., a foreign corporation fka Provident Companies, Inc.,
Defendants-Appellants.

No. 02-16501

Filed March 4, 2004

ORDER

Before: PREGERSON, BEAM,* and PAEZ, Circuit Judges.

The memorandum disposition filed on January 12, 2004, is hereby AMENDED as follows:

1. On page 3, the following sentence is deleted: "Nor was the district court obliged to make an express reliability finding after Paul Revere explicitly waived its objection to Kelley's testimony about industry standards." Footnote 1 is also deleted.

2. In their place on page 3, the following new sentences are added: "Even assuming that the district court erred in allowing Kelley to testify, we cannot reverse absent some showing of prejudice. See *Janes*, 279 F.3d at 886. Here, Paul Revere was not prejudiced because much of Kelley's testimony about the indus-

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* The Honorable C. Arlen Beam, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

try standards for the proper handling of disability claims was corroborated by one of Paul Revere's lead claim examiners on the witness stand. Thus, the decision to admit Kelley's testimony ultimately was not prejudicial."

With these amendments, the petition for rehearing and for rehearing en banc is DENIED. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(f).